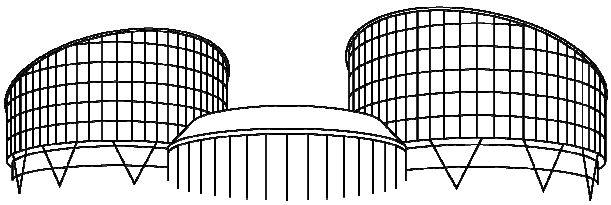

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 15009/09
by Eric NDUWAYEZU
against Sweden

The European Court of Human Rights (Third Section), sitting on 8 December 2009 as a Chamber composed of:

Josep Casadevall, *President*,
Elisabet Fura,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Egbert Myjer,
Luis López Guerra,
Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 19 March 2009,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Eric Nduwayezu, is a Burundian national who was born in 1978 and is currently in France.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Proceedings before the Swedish authorities and courts

3. On 3 October 2006 the applicant applied for asylum and a residence permit in Sweden. Before the Migration Board (*Migrationsverket*) he stated that his name was Eric Ngendakuriyo, born on 15 August 1980, and of Tutsi ethnicity. He was from Bujumbura Rural, married and had finished his studies in June 2005. The applicant further claimed that he had flown from Bujumbura airport to Sweden on 30 September 2006, with a stop-over in an unknown country. He had used a fake passport and a "white man" had escorted him. As concerned his grounds for seeking asylum he submitted that, in June 1997, his mother had been killed by L., a man who was now a police officer, and that he had been the only witness to the murder. Moreover, two of his brothers had been killed by a man named P. in 1993. The applicant further alleged that, since 1999, he had been active in the *Association Pour La Lutte Contre Le Genocide* (hereafter "the Association"). He had been arbitrarily detained from 5 February 2003 to 26 July 2003 and again from 19 March 2004 to 6 August 2004. On neither of these two occasions had he been given any explanation for the deprivation of his liberty or his release. He had again been arbitrarily detained between 14 and 20 August 2005. He suspected that this deprivation of liberty had been ordered by L. and that he had been released only because he had been so badly beaten that they had feared that he would die. He had again been detained from 13 January 2006 to 28 August 2006 because he had participated in a demonstration to protest against a decision to release a number of persons convicted of genocide. The applicant claimed that he had been the victim of serious abuse each time he had been detained. Furthermore, on 4 September 2006 he and some friends had been attacked but he had managed to escape. He thought that the attack was due to his political engagement and his witness statements. The applicant submitted to the Board that the main reason for his persecution was his ethnicity and his political opinion.

4. At the Board's oral meeting with the applicant, he submitted essentially the following. His father owned land and lived in Kiganda whereas his wife and brothers lived in Bujumbura. Moreover, it was a relative of L.'s, by the name of F., who had killed his mother when the bus they were travelling on had been stopped by rebels. The national army had intervened and so he and the other passengers had survived. He had reported the event to the police and he had been supposed to testify but F. had not appeared for the trial. Instead he had testified in court in 1998 and 2000 against L., despite the fact that he had never witnessed L. commit any

crime, but because he had wanted to know where F. was hiding. He had also testified against P. who had killed his brothers in October 1993. Although he and his brothers had been hiding in different houses, he was sure that it was P. who had killed them. He had not been the only witness and P. had been imprisoned. Furthermore, the first time he had been arbitrarily detained, he had been at a meeting with the Association and 12 of them had been arrested. The second time, he had been detained together with about 50 others at the boarding school he attended, probably because they were ethnic Tutsi. The third time, he had been out walking when he had been taken by rebels on the orders of F., who by then had become a police chief, and wanted to prevent him from testifying. He had managed to get a message out to his uncle, who was in the military, and who had come to inquire as to why he had been detained. As there had been no answer, they had released him. The fourth time, he had been detained together with about 20 other persons during a demonstration against a decision to release political prisoners since, among those prisoners, were persons who had committed genocide, *inter alia*, P. and L. On three occasions, he had been released through the help of an organisation which helps prisoners and he had only been ill-treated when he had been detained by the rebels. Moreover, he had been a member of the Association since 1996 and had participated in meetings and organised one demonstration. He thought that he was sought by the authorities because he had testified.

5. In a written submission to the Migration Board, the applicant added that the trials against L. and P. had been held at the same time in June 1998 and that he had testified against both of them. They had then been imprisoned until the second trial in October 2000, when he had again testified against them. L. had been sentenced to 20 years' imprisonment and P. had been sentenced to death. In May 2006 he had gone to the police to report that F. had killed his mother but the court had not considered his report. On 9 January 2006 everyone who had been convicted of crimes against the Tutsi population had been released from prison and the applicant claimed that he now felt threatened by L., P. and F. since they held positions of power within the Government.

6. On 12 February 2008 the Migration Board rejected the application. It first noted that the applicant had only submitted an identity card, issued after he had left Burundi, and of simple quality. He had not submitted any other documents to prove his identity. The Board also found it highly unlikely that the applicant had travelled to Sweden without having to show a passport during the trip, despite transfers. It considered that the applicant had withheld information and that he had probably left Burundi legally. However, the Board accepted that he was from Burundi but considered that the general situation in that country was not so serious that the applicant could be granted leave to remain in Sweden on this sole ground. Turning to the applicant's personal situation, the Board first observed that he had

submitted no evidence at all. It then considered that the applicant had given rather vague and unclear information about his testimonies and police reports. In particular, as concerned his mother's death, the Board found it unlikely that he would have waited from 1997 until 2006 to report the assailant to the police, especially since there had been many witnesses on the bus and the army had intervened. It further found improbable that the applicant had testified against L. as he had not witnessed him commit any crime and since, as a witness, he did not have the right to question L. The Board also found reason to doubt that he had testified against P. since he had only been 13 years old at the time of the crimes and had been hiding in a different house from where his brothers had been killed. Furthermore, the Board observed that there had been several witnesses testifying against P. and L. during their trials for which reason it was unlikely that they would seek revenge on the applicant. As concerned F., it appeared that he had neither been charged nor prosecuted. Hence, it was improbable that he would be looking to eliminate the applicant and, if the applicant had been detained and ill-treated by rebels in August 2005, this was rather due to the general violence than due to F.'s orders. Turning to the applicant's claim that he had been arbitrarily detained, the Board found no reason to question this since such detention was widespread in Burundi. It then noted that the applicant had not been ill-treated during these arrests and that he had been released with the help of a specialised organisation. Moreover, he had not held a prominent position within the Association and had each time been detained together with several others. Thus, the Board considered that it had not been shown that the arbitrary arrests had been due to his activities within the Association. Also, since he had been released each time without being charged with a crime, the Board found it very unlikely that he was sought in Burundi. It also observed that he was a young, well-educated man whose wife and relatives were in his home country. Consequently, the Board concluded that the applicant was not a refugee or otherwise in need of protection in Sweden.

7. The applicant appealed to the Migration Court (*Migrationsdomstolen*), relying on the same grounds as before the Board and adding, *inter alia*, the following. He had never claimed to have been persecuted by the Burundian government. However, he had been persecuted, imprisoned and the victim of an attempt to kill him by persons against whom he had testified. Other witnesses, who had testified in such proceedings, had been killed or tortured by the rebels against whom they had testified once these rebels had been released. The authorities could not protect him since some of the criminals were now in high positions within the government and police. The applicant claimed that he was most afraid of F. who had been a rebel but had since become a police officer with friends in many places. P. and L. were normal persons.

8. On 2 July 2008 the Migration Court, after having held an oral hearing where the applicant was heard, rejected the appeal. It noted that the applicant had only been detained in connection with concrete situations and that he had been released with the help of an organisation. In the court's view, this did not amount to persecution but was rather a reflection of the unstable situation in the country. The court further observed that the applicant had been unable to account for any tangible threats against him personally. It also pointed out that he had been released, relatively unharmed, after one week of captivity by F.'s rebel group which indicated that F. had not intended to kill him. Hence, it concluded that the applicant had not made probable that he was in need of protection in Sweden.

9. Upon further appeal, the Migration Court of Appeal (*Migrationsöverdomstolen*) refused leave to appeal on 24 September 2008.

10. In January 2009 the applicant requested the Migration Board to review his case since he was a survivor of the genocide in Burundi and therefore entitled to protection in Sweden.

11. On 21 January 2009 the Migration Board rejected the request as the applicant had failed to invoke any new circumstances and as there were no impediments to the enforcement of the deportation order.

12. The applicant appealed to the Migration Court and added to his earlier claims that, on 15 September 2006, he had left Burundi on a flight to France where he had remained for some days before continuing his journey to Sweden by train. Hence, it was France that should try his asylum request. In the alternative, he asked to be allowed to travel to France to renew his registration at a French university. The applicant produced a copy of a passport in the name of Eric Nduwayezu, born on 5 August 1978, with an entry stamp dated 15 September 2006 at Roissy Airport in France. The passport also contained a multi-entry visa for France, valid from 21 August 2006 until 19 November 2006. On the visa it was stated that the holder was a student and that he should request a residence permit (*carte de séjour*) upon arrival in France.

13. On 20 February 2009 the Migration Court upheld the Migration Board's decision in full and, upon further appeal, the Migration Court of Appeal refused leave to appeal on 20 March 2009.

2. The request for application of Rule 39 of the Rules of Court and further information in the case

14. On 22 March 2009 the applicant requested the Court to apply Rule 39 of the Rules of Court in order to stop the enforcement of his deportation, scheduled for the following day. He submitted that his name was Eric Nduwayezu, born on 5 August 1978, and he produced a copy of his French visa as proof. He maintained the claims he had presented to the Swedish authorities.

15. On 23 March 2009 the Acting President of the Section to which the case had been allocated rejected the request. On the same day the Swedish police tried to enforce the deportation of the applicant but he violently resisted. Although the police officers managed to get him on the plane, the pilot felt that he could not ensure the safety of all passengers with the applicant on board and so he was taken off the plane again and returned to the detention centre.

16. The applicant then renewed his request for interim measures to the Court, insisting that deportation would violate his right to life and adding that his treatment by the Swedish police had amounted to mental and physical torture. The request was refused by the Acting President of the Section on 25 March 2009, confirmed by a Chamber of the Section on 31 March 2009.

17. On 7 July 2009 the applicant informed the Court that he was in France.

B. Relevant domestic law

18. The basic provisions applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the 2005 Aliens Act (*Utlänningslagen*, 2005:716 – hereafter referred to as "the 2005 Act").

19. Chapter 5, Section 1, of the 2005 Act stipulates that an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden. According to Chapter 4, Section 1, of the 2005 Act, the term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, Section 2, of the 2005 Act).

20. Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) to allow him or her to remain in Sweden (Chapter 5, section 6 of the 2005 Act). During this

assessment, special consideration should be given to, *inter alia*, the alien's health status. In the preparatory works to this provision (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien's home country could constitute a reason for the grant of a residence permit.

21. As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 12, Section 1, of the 2005 Act). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, Section 2, of the 2005 Act).

22. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This applies under Chapter 12, Section 18, of the 2005 Act, where new circumstances have emerged that mean there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced. If a residence permit cannot be granted under this provision, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, Sections 1 and 2, of the 2005 Act, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not doing so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, Section 19, of the 2005 Act).

23. Under the 2005 Act, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances; the Migration Board, the Migration Court and the Migration Court of Appeal (Chapter 14, Section 3, and Chapter 16, Section 9, of the 2005 Act).

COMPLAINTS

24. The applicant complained under Articles 2 and 3 of the Convention that, if deported from Sweden to Burundi, he would face a real risk of being killed by people who had been involved in the genocide in 1993 since he

had been a witness to these atrocities and had testified against some of them. He further alleged that he had been treated in an inhuman manner, contrary to Article 3, by the Swedish police when they had tried to enforce his deportation on 23 March 2009. Lastly, he complained under Article 6 of the Convention that the proceedings before Swedish authorities and courts had been unfair.

THE LAW

25. The applicant alleged that his deportation to Burundi would constitute a violation of Articles 2 and 3 of the Convention which, in the relevant parts, read:

Article 2 (right to life)

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 3 (prohibition of torture)

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

26. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008-...).

27. Moreover, the Court finds that the issues under Articles 2 and 3 of the Convention are indissociable and it will therefore examine them together.

28. Whilst being aware of reports of serious human rights violations in Burundi, the Court does not find them to be of such a nature as to show, on their own, that there would be a violation of the Convention if the applicant were to return to that country. The Court has to establish whether the

applicant's personal situation is such that his return to Burundi would contravene the relevant provisions of the Convention.

29. In this respect, the Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008, and *Collins and Akasiebie v. Sweden* (dec.), no. 23944/05, 8 March 2007). In principle, the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005).

30. In the case before it, the Court first has to take into account the fact that the applicant lied to the Swedish authorities upon arrival in Sweden about his identity and how he had travelled to Sweden. He gave a false name and date of birth and submitted a forged identity card to the authorities. Moreover, he alleged that he had used a fake passport and did not know the travel route while, in reality, he had travelled legally to France on his own passport and with a valid entry visa to study in France. These untruths clearly affect the applicant's general credibility negatively in the eyes of the Court.

31. However, before the Court, as before the national authorities, the applicant has alleged that L., P. and F. would attempt to kill him if he were returned to Burundi because he was a witness to their crimes and had testified against them. He has further claimed that he has not been persecuted by the Burundian authorities but that they would not be able to protect him.

32. In relation to this, the Court observes that the applicant, before the Swedish authorities, altered his story and gave inconsistent information about the events in his home country. For instance, he first told the Migration Board that he had been the only witness to his mother's murder by L. while he later stated that she had been killed by a rebel, F., while they were travelling on a bus and that the military had intervened. He also first claimed that he had been ill-treated each time he had been arbitrarily detained whereas he later alleged that it was only when the rebels had taken him prisoner that he had been badly treated. Furthermore, he changed his original statement that L., P. and F. held positions of power within the Burundian government to submitting that F. had become a police officer and had friends in many places whereas L. and P. were normal persons. These inconsistencies in the applicant's story further weaken his credibility

before the Court. Here the Court would stress that the applicant has not submitted any evidence whatsoever in support of his claims which could have strengthened his case.

33. In any event, the Court notes that, according to the applicant himself, there were several witnesses against L. and P. and that F. has never been prosecuted or tried for any crime. Moreover, it considers that the applicant's contention that F. wanted to kill him is inconsistent with his submission that F.'s rebels released him in August 2005. Furthermore, the Court observes that the applicant's wife, his father and brothers still remain in Burundi and that he has not claimed that they have been threatened or questioned about his whereabouts. Since his father has property and lives in another part of Burundi, the Court considers that the applicant would be able to settle there if he felt insecure in Bujumbura.

34. Consequently, having regard to all of the above, the Court considers that the applicant has failed to show that his return to Burundi would expose him to a real risk of being arrested and ill-treated or killed in violation of Articles 2 and 3 of the Convention.

35. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

36. Turning to the applicant's allegation, under Article 3 of the Convention, of having been treated in an inhuman manner by the Swedish police on 23 March 2009, the Court observes that he has not lodged a formal complaint in Sweden concerning this matter. It follows that he has failed to exhaust domestic remedies in accordance with Article 35 § 1 of the Convention and, consequently, the complaint must be rejected pursuant to Article 35 § 4 of the Convention.

37. As concerns the applicant's complaint under Article 6 of the Convention, that the national proceedings were not fair, the Court notes that this provision does not apply to asylum proceedings as they do not concern the determination of either civil rights and obligations or of any criminal charge (*Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X). Consequently, this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President